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Public Prosecutor v Ibrahim bin Tassim & Anor

HIGH COURT (KOTA KINABALU) — CASE NO BK1–41–26/4 OF 2012
CHEW SOO HO J
26 MARCH 2013

Criminal Procedure — Appeal — Appeal against acquittal — Non-appearance of respondent — Respondents charged with attempting to dispose of stolen property with common intention — Appeal against acquittal — Second respondent could not be found to serve the notice of appeal on him — No prospect of tracing second respondent — Whether injustice caused to first respondent to proceed with appeal — Whether court had discretion to hear appeal — Criminal Procedure Code s 314(1) & (ii)

Both the respondents were charged at the magistrates court with the charge of attempting to dispose of stolen property, an offence under s 414 of the Penal Code read with s 34 and s 511 of the same Code. The learned magistrate acquitted and discharged both the respondents without calling for their defence and the appellant appealed against the acquittal. However, the appellant could not trace the second respondent to serve the notice of appeal on him despite the hearing of the appeal being adjourned several times for that reason. On 17 January 2013, when the appeal was called up, the learned DPP informed the court that since all efforts to trace the second respondent had been futile, he left it to the court as the charge was one under common intention.

Held, striking out the appeal:

(1) In view of the second respondent not being able to be traced and there being no prospect of him being traced and as the charge was one based on common intention of both the respondents, the appeal could not thus be proceeded on against the first respondent alone (see para 4).

(2) Any adjournment in the circumstances would not only be an act of futility but an injustice to the first respondent who would be required to attend court again and again just to learn the same answer that the appeal could not again be proceeded because the second respondent could not be traced (see para 6).

(3) If s 314(2) of the Criminal Procedure Code ('the CPC') is to be interpreted as a strict mandatory provision, it may be inconsistent or repugnant to s 314(1) where fundamentally the court shall not make any order in the appeal adverse to or to the prejudice of the respondent since proceeding to hear the appeal in the absence of the respondent under s

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314(2) may result in an order adverse to or to the prejudicial of the respondent. Therefore, s 314(2) of the CPC cannot be construed as a mandatory provision that the court must proceed to hear the appeal in the absence of the respondent when service of the notice of hearing cannot be effected. It is the discretion of the court whether to proceed to hear the appeal or otherwise. If the court were to decline to hear the appeal as in the case where the appellant/public prosecutor cannot or does not wish to proceed further, an order to strike out the appeal can be made under the provision (see para 8).

(4) The appellant through the learned DPP appearing before the court expressing that the appellant would leave the matter to the court, manifested the appellant's intention not to proceed with the appeal. Hence, the appropriate and just course for the court under s 314(2) of the CPC was to dispense with the hearing of the appeal and strike out the appeal (see para 9).

[Bahasa Malaysia summary

Kedua-dua responden dituduh di mahkamah majistret dengan tuduhan cubaan membuang barang curi, kesalahan di bawah s 414 Kanun Keseksaan dibaca bersama s 34 dan s 511 Kanun yang sama. Majistret yang bijaksana melepaskan dan membebaskan kedua-dua responden tanpa memanggil untuk pembelaan mereka dan perayu merayu terhadap pelepasan tersebut. Walau bagaimanapun, perayu tidak dapat mengesan responden kedua untuk menyerahkan notis rayuan ke atasnya walaupun pendengaran rayuan ditangguhkan beberapa kali untuk sebab tersebut. Pada 17 Januari 2013, apabila rayuan dipanggil, TPP yang bijaksana memberitahu mahkamah bahawa memandangkan kesemua usaha untuk mengesan responden kedua adalah sia-sia, dia menyerahkan kepada mahkamah untuk memutuskan kerana tuduhan adalah satu di bawah niat bersama.

Diputuskan, membatalkan rayuan:

(1) Mengambil kira responden kedua tidak dapat dikesan dan sebenarnya tiada prospek untuk dia dikesan dan memandangkan tuduhan adalah satu berdasarkan niat terhadap kedua-dua responden, oleh itu rayuan tidak boleh diteruskan terhadap responden pertama sahaja (lihat perenggan 4).

(2) Apa-apa penangguhan dalam keadaan itu bukan sahaja menjadi tindakan sia-sia tetapi tidak adil kepada responden pertama yang dikehendaki menghadiri mahkamah beberapa kali hanya untuk mengetahui jawapan yang sama bahawa rayuan sekali lagi tidak boleh diteruskan kerana responden kedua tidak dapat dikesan (lihat perenggan 6).

(3) Jika s 314(2) Kanun Tatacara Jenayah ('KTJ') ditafsirkan sebagai peruntukan mandatori ketat, ia mungkin tidak konsisten atau

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bertentangan dengan s 314(1) yang mana pada asasnya mahkamah tidak akan membuat apa-apa perintah dalam rayuan bertentangan atau prejudis kepada responden memandangkan prosiding untuk mendengar rayuan dalam ketidakhadiran responden di bawah s 314(2) akan menyebabkab perintah bertentangan atau prejudis terhadap responden. Oleh itu, s 314(2) KTJ tidak boleh ditafsirkan sebagai peruntukan mandatori bahawa mahkamah mesti meneruskan mendengar rayuan dalam ketidakhadiran responden apabila penyerahan notis pendengaran tidak boleh dibuat. Adalah budi bicara mahkamah sama ada untuk meneruskan untuk mendengar rayuan atau sebaliknya. Jika mahkamah menolak daripada mendengar rayuan tersebut seperti di dalam kes tersebut di mana perayu/pendakwa raya tidak boleh atau tidak mahu meneruskan selanjutnya, perintah untuk membatalkan rayuan boleh dibuat di bawah peruntukan itu (lihat perenggan 8).

(4) Perayu melalui TPP yang bijaksana hadir di hadapan mahkamah menyatakan bahawa perayu akan menyerahkan perkara tersebut kepada mahkamah untuk memutuskan, menunjukkan niat perayu untuk tidak meneruskan dengan rayuan tersebut. Maka, jalan yang betul dan wajar untuk mahkamah di bawah s 314(2) KTJ adalah untuk tidak mendengar rayuan dan membatalkan rayuan tersebut (lihat perenggan 9).]

Notes

For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 180–213.

Cases referred to

PP v Goh Thor Kiah [1952] 1 MLJ 91b (refd)

Legislation referred to

Criminal Procedure Code s 314(1), (2)
Penal Code ss 34, 414, 511

Ahmad Nazneen Zulkifli (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hairol Vaiyron (Hairol Vaiyron & Co) for the first and second respondents.

Chew Soo Ho J:

[1] Both the respondents were charged at the magistrates court at Kota Kinabalu with the charge of an attempt to dispose of stolen property to writ, a Toyota Vios bearing Registration No BAE 5347, pursuant to a common intention sometime in August 2011 during the day time at Asia City, Kota Kinabalu thereby committing an offence under s 414 of the Penal Code real with ss 34 and 511 of the same Code. Both the respondents pleaded not guilty

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and full trial was proceeded on. At the end of the appellant's case the learned magistrate acquitted and discharged both the respondents without calling for their defence. Upon this order of acquitral that the appellant appealed.

[2] This appeal had been scheduled before this court for hearing on three occasions with the last date on 17 January 2013 to enable the appellant to cause the second respondent to be traced in order that this appeal could be proceeded on. The notice of appeal dated 29 March 2012 was feed in court on 30 March 2012. Since 7 August 2012, there had been several mention with followed by few hearing dates on the same ground that the second respondent was not traced.

[3] On 17 January 2013, when this appeal was called up, the learned DPP appearing for the appellant inforced this court that effort had been made to trace the second respondent suit it was fulfill. He added that since this is a 2011 appeal which should be a 2011 case, the appellant would leave if to the court with the emphasis that the charge is one under common intention. Learned counsel for the respondents submitted that this appeal had been postponed many times and his client, the first respondent had been present each and every time and hence he prayed for the appeal to be struck out. In reply the learned DPP again reiterate that he would have it to the court as it was the third times the notice remained unserved.

[4] It was upon such assertions by both parties ie with the learned DPP on the one had not proviting to proceed with the appeal in the absence of the second respondent not to leave the matter to court and not objecting to the first respondent's counsel's submission urging this court to strike out the appeal since this was the third time that the appeal record and notice of hearing could not be effected on the second respondent and with learned counsel for the first respondent applying for the appeal to be struck out in views of the many postponements. On the other hand, this court ruled that in view of the second respondent not being able to be traced and there is no prospect of him being traced and as the charge is one based on common intention of both the respondents, the appeal cannot thus be proceeded on against the first respondent alone.

[5] This court, holds that it would be unfair and unjust to the second respondent that the charge is hanging over his head indefinitely when there is no prospect of tracing the second respondent to proceed with this appeal. In the circumstrances. It would be fair and just that the appeal is to be struck out and it was thus no ordered.

[6] The appellant was appeals which are astonishing. It must be noted that the appellant had not appealed for an adjournment on the 17 January 2013 for

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obvious reason that effort had been made but still could not trace the second respondent. It is reasonable to infer that there is no prospect to trace the second respondent by the fact that the learned DPP submitted that he would leave the matter to the court. Any adjournment (s 314(1) of the Criminal Procedure Code) in the circumstances would not only be an act of futility but an injustice to the first respondent who would be required to attend court again and again just to learn the same answer that the appeal cannot again be proceeded because the second respondent could bot be traced. This court is well aware of the provision of s 314(1) and (2) of the Criminal Procedure Code ('the CPC') which requires the court hearing the appeal not to make any order adverse to or to the prejudice of the respondent not to adjourn the proceeding and order re-service of the notice of hearing or that if the service cannot be effected on the respondent as in the instant case that the court shall proceed to hear the appeal in his absence. In the instant case, when the learned DPP did not proceed with the appellant's appeal in the absence of the second respondent but had elected to leave the matter to the court. I could only decisions that the appellant does not wish to proceed with the appeal. I am contain that case of this court were to instant the appellant to proceed pursuant to s 314(2) of the CPC, the same answer would be closed that 'we leave it to Court'. It would therefore be a waste of judicial time to hear the appellant who was not been to proceed with the appeal. However, although the provision of s 314(2) of the CPC provides that:

> (ii) if the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

[7] It should not be construed as a mandatory provision that the court 'shall proceed to how the appeal' in the absence of the second respondent. In *Public Prosecutor v Goh Thor Kiah* [1952] 1 MLJ 91b, Taylor J expressed that the word 'shall' in s 314(2) of the CPC could not be construed as strictly as contended. His Lordship said:

> The learned deputy now applies under this sub-section for the appeal to be heard on the meris in the absence of the respondent and suggests that a more severe sentence should be passed and a warrant issued to enforce it. It is addmitted that his construction is suprising in that it invoices the proposition that person who has been acquitted in one of the lower Courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alterem partem* and in any view is wholly opposed to all our principles of judicial procedure.
>
> I think the explanation of the section is this. Originally there was no appeal by the public prosecutor; the chapter was framed on the view that the would be the respondent and provision is made for the record to be transmitted to him by way of service but without beiong actually served. Much later, the Code was amended to permit of an appeal on the merits by the public prosecutor but s 314 was not

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amended. I agree that it is a strong thing to construe the word 'shall' as 'may' but I do not go as far as that. In my opinion, having regards to what I believe to be the history of the section, the true construction is: 'shall' if the prosecutor is the respondent. 'I do not think that the wourd 'shall', in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word 'shall' must be given a meaning modified to the extend which I have indicated'.

[8] Adding to what Taylor J had enunciated on the proper interpretation of s 314(2) of the CPC wherein His Lodships view was based on the doctrine of *audi alterem partem*, I am of the view that if s 314(2) of the CPC is to be interpreted as a strict mondatory provision, it may be inconsistant or repayment to s 314(2) where fundamentally the court shall not make any order in the appeal advserve to or to the prejudice of the respondent since proceeding to hear the appeal in the absence of the respondent under s 314(2) may result in an order adversed to or to the prejudicial of the respondent as in the example cited by Taylor J. Therefore, s 314(2) of the CPC cannot be construed as a mandatory provision that the court must proceed to hear the appeal in the absence of the respondent when service of the notice of hearing cannot be effected. It is the discretion of the court whether to proceed to hear the appeal or otherwise. I hold the view that if the court were to decline to hear the appeal as in the case where the appellant/public prosecutor cannot or does not wish to proceed further, an order to strike out the appeal can be made under this provision.

IN CONCLUSION

[9] In the circumstances of this case where the appellant through the learned DPP appearing before this court on 17 January 2013 expressiong that the appellant would leave the matter to the court which, do this court, has manifested the appellant's intention not to proceed with the appeal, the appropriate and just course for this court under s 314(2) of the CPC is to dispence with the hearing of the appeal and make the orders to strike out the appeal as well as to affirm the order of the court belows.

[10] If the appellant is interested and been to proceed with this appeal, the learned DPP should not have taken the course as he did but should insint to proceed with the appeal in the absence of the second respondent or to proceed against the first respondent alone. By not applying even to proceed with the appeal against the first respondent alone on ground that it is a case where the charge is under common intention, the appellant has virtually abondoned this appeal. Consequently for the foregoing reasons, I find of just to order this appeal to be struck out.

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Appeal struck out.

Reported by Kanesh Sundrum